Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (Personal representative of the estate of Chan Weng Sun, deceased)

FEDERAL COURT (JOHOR BAHRU) — SUPREME COURT CIVIL APPEAL NO 02–734 OF 1993
CHONG SIEW FAI CJ (SABAH & SARAWAK), MOHD AZMI AND WAN ADNAN FCJJ
18 DECEMBER 1996

Contract *— Fraud — Specific performance — Whether option agreement was obtained by fraud so as to render it unenforceable — Contracts Act 1950 s 17*

Contract *— Fraud — Standard of proof — Allegation of fraud was civil in nature — Whether the burden of proof of civil fraud was on the balance of probabilities — Contracts Act 1950 s 17*

Evidence *— Burden of proof — Fraud alleged in civil case — Quantum of proof — Allegation of fraud was civil in nature — Whether the burden of proof of civil fraud was on the balance of probabilities*

The appellant's claim was for an order for specific performance of an option agreement dated 5 January 1977 ('the option agreement'), allegedly given by the respondent's deceased husband ('Mr Chan') in respect of a fruit plantation ('the orchard'). The orchard was also the subject matter of an earlier business arrangement between the two parties as represented by a lease agreement ('the lease agreement'), entered by them in 1971 for a period of 15 years. The option agreement was thus executed during the currency of the lease agreement to run over a period of nine years until the expiry of the lease in 1986. The respondent's contention was that the purported option was obtained by fraudulent means and was therefore null and void and unenforceable, and that the late Mr Chan during his lifetime was under no obligation to complete the option agreement. Fraud and other defences in the alternative were pleaded in the statement of defence, including false representations, non est factum and failure of consideration. The main issue for determination in this appeal was whether, on the various findings of fact made by the learned trial judge against the appellant, it would be sufficient to prove that the option agreement was obtained by fraud so as to render it unenforceable. A further issue in this case was in relation to the burden of proof of fraud in civil proceedings.

Held, dismissing the appeal:

(1) The motive and opportunity for the appellant to commit fraud on the late Mr Chan by means of the option document was clear, self-evident and based on the following factors, namely: (i) the close business friendship between the late Mr Chan and the appellant which started in 1968 when the appellant first became interested in developing the land in dispute into a fruit plantation;

(ii) on 4 July 1971, the property was leased to the appellant for 15 years at a nominal rent of RM350 per year whereby Mr Chan practically got no income at all from his land for 15 years, but in return, out of jungle land he would reap the benefit of being the owner of a valuable orchard. Mr Chan became curious to know the current value of his up-and-coming orchard and as such, it was easy for the appellant to exploit the situation fully by fraudulently misrepresenting that the so-called option document was not for the purpose of sale by him but merely to enable him to test the property market.

Further, the fact that prior to the issue of the writ, neither Mr Chan nor members of his family had used in any of their letters the word 'cheating' or 'fraud' was not by itself fatal. What the court had to decide was whether in the totality of the oral and documentary evidence, there was fraud as defined in s 17 of the Contracts Act 1950. In this case, there was motive and opportunity to commit fraud (see pp 53C–D, G–I and 54I).

(2) The basis of the remedy of specific performance lies in equity and as such, where — as in this case — the appellant did not come with clean hands, then the court was entitled to refuse the remedy in order to protect the respondent from being a victim of sharp practice (see p 56B).

(3) Whether the allegation of fraud in civil proceedings concerns criminal fraud such as conspiring to defraud, misappropriation of money or criminal breach of trust, it is settled law that the burden of proof is the criminal standard of proof beyond reasonable doubt and not on the balance of probabilities. An allegation of criminal fraud in civil or criminal proceedings cannot be based merely on suspicion or speculation. However, where the allegation of fraud is entirely founded on civil fraud and not on criminal conduct or offence, a balance of probability is applicable. In this case, since the allegation of fraud was purely civil in nature and not based on or connected with a criminal offence, the civil standard was applicable (see pp 59I, 60A–B, D and 61F–G).

[Bahasa Malaysia summary

Tuntutan perayu adalah untuk pelaksanaan spesifik suatu perjanjian opsyen bertarikh 5 Januari 1977 ('perjanjian opsyen tersebut'), yang dikatakan telah diberikan oleh mendiang suami penentang ('En Chan') berkenaan dengan sebuah dusun ('dusun tersebut'). Dusun tersebut juga merupakan perkara subjek suatu perjanjian perniagaan yang lebih awal di antara kedua-dua pihak seperti yang diwakili oleh suatu perjanjian pajakan ('perjanjian pajakan tersebut') yang diikat dalam tahun 1971 untuk jangka masa selama 15 tahun. Perjanjian opsyen tersebut telah dilaksanakan semasa jangka masa perjanjian pajakan tersebut untuk berterusan selama jangka masa sembilan tahun sehingga tamatnya pajakan dalam tahun 1986. Hujahan penentang adalah bahawa opsyen yang dikatakan itu telah diperolehi melalui

A fraud dan dengan itu ianya adalah batal dan tak sah dan tidak boleh dikuatkuasakan, dan bahawa mendiang En Chan, semasa umur hidupnya, tidak wajib menyempurnakan perjanjian opsyen tersebut. Fraud dan pembelaan lain secara alternatif telah dihujahkan dalam pernyataan pembelaan, termasuk nyataan palsu, non est factum dan
B kegagalan balasan. Isu utama untuk penentuan dalam rayuan ini adalah sama ada, berdasarkan pendapat fakta-fakta yang dibuat oleh hakim perbicaraan yang arif terhadap perayu, adalah memadai untuk membuktikan bahawa perjanjian opsyen tersebut telah diperolehi melalui fraud menyebabkan ia tidak dapat dikuatkuasakan. Isu seterusnya dalam kes ini adalah berkaitan dengan beban membukti
C fraud dalam prosiding sivil.

Diputuskan, menolak rayuan:

(1) Motif dan peluang perayu untuk melakukan fraud ke atas mendiang En Chan melalui dokumen opsyen tersebut adalah
D jelas, telah dibukti dan berdasarkan faktor-faktor berikut, iaitu: (i) persahabatan perniagaan yang karib di antara mendiang En Chan dan perayu yang bermula dari tahun 1968 apabila perayu pertama kali menunjukkan minatnya untuk memajukan tanah yang dipertikaikan menjadi sebuah dusun; (ii) pada 4 Julai 1971, tanah tersebut telah dipajak kepada perayu untuk 15 tahun
E pada kadar sewa nominal RM350 setahun di mana En Chan telah tidak menerima apa-apa pendapatan dari tanahnya selama 15 tahun, tetapi sebagai balasan, dia akan mendapat faedah daripada kedudukan sebagai tuan punya sebuah dusun yang bernilai yang dimajukan dari tanah hutan. Encik Chan ingin
F tahu nilai semasa dusun yang sedang meningkat maju dan dengan itu, mudah sahaja untuk perayu mengeksploitasikan keadaan sepenuhnya dengan menyalahgambarkan secara fraud bahawa opsyen dokumen yang dikatakan bukanlah untuk tujuan jualan olehnya tetapi hanya untuk membolehkannya menguji harga pasaran harta tanah.

G Selanjutnya, fakta bahawa sebelum writ dikeluarkan, si mati ataupun ahli-ahli keluarganya tidak menggunakan perkataan 'menipu' atau 'fraud' dalam surat-menyurat mereka tidak membawa padah. Apa yang harus diputuskan oleh mahkamah adalah sama ada jika keterangan lisan dan dokumentari diambil
H secara keseluruhan, terdapatnya fraud seperti yang ditafsirkan dalam s 17 Akta Kontrak 1950. Dalam kes ini, terdapat motif dan peluang untuk melakukan fraud (lihat ms 53C–D, G–I dan 54I).

(2) Asas remedi pelaksanaan spesifik terletak dalam ekuiti dan oleh yang demikian, di mana — seperti dalam kes ini — perayu
I bersalah ketika menghadapi mahkamah, maka mahkamah berhak menolak remedi demi melindungi penentang daripada menjadi mangsa perbuatan yang licik ini (lihat ms 56B).

(3) Sama ada pengataan fraud dalam prosiding sivil adalah berkenaan fraud jenayah seperti komplot untuk memfraud, pelesapan wang ataupun pecah amanah jenayah, ianya merupakan undang-undang

mantap bahawa beban membukti adalah darjah membukti jenayah iaitu melampaui keraguan munasabah dan bukannya atas imbangan kebarangkalian. Pengataan fraud jenayah dalam prosiding jenayah ataupun sivil tidak boleh berdasarkan sangsi atau spekulasi semata-mata. Walau bagaimanapun, di mana pengataan fraud adalah berdasarkan fraud sivil keseluruhannya dan bukan berdasarkan kelakuan atau kesalahan jenayah, imbangan kebarangkalian adalah terpakai. Dalam kes ini, oleh kerana pengataan fraud bersifat sivil semata-mata dan bukannya berdasarkan atau berkaitan dengan suatu kesalahan jenayah, darjah sivil adalah terpakai (lihat ms 59I, 60A–B, D dan 61F–G)].

Notes

For cases on burden of proof, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 158–359.

For cases on fraud, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1601–1602.

Cases referred to

ALN Narayanan Chettyar & Anor v Official Assignee High Court Rangoon AIR 1941 PC 93 (refd)

Arabinda Barma v Chandra Kanta AIR 1954 Assam 94 (refd)

Chu Choon Moi v Ngan Sew Tin [1986] 1 MLJ 34 (refd)

Datuk Jagindar Singh & Ors v Tara Rajaratnam [1986] 1 MLJ 105 (refd)

Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor [1989] 1 MLJ 35 (refd)

Hansraj Gupta & Ors v Dehra Dun Mussoorie Electric Tramway Co Ltd AIR 1940 PC 98 (refd)

Lau Kee Ko & Anor v Paw Ngi Siu [1974] 1 MLJ 21 (refd)

M Ratnavale v S Lourdenadin [1988] 2 MLJ 371 (refd)

O'Neil v Arnew (1976) 78 DLR (3d) 671 (refd)

Pateman v Pay (1974) 232 EG 457 (refd)

Saminathan v Pappa [1981] 1 MLJ 121 (refd)

Sykt Islamiyah v Bank Bumiputra Malaysia Bhd [1988] 3 MLJ 218 (refd)

United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd [1993] 1 MLJ 182 (refd)

Legislation referred to

Contracts Act 1950 ss 17, 18

National Land Code 1965 s 340(2)

Appeal from: Civil Suit No 790 of 1977 (High Court, Johor Bahru)

CV Das (*Rosita Yeo* with him) (*Yeo & Co*) for the appellant.

Cecil Abraham (*Dhinesh Baskaran* with him) (*Shearn Delamore & Co*) for the respondent.

Cur Adv Vult

Mohd Azmi FCJ (delivering the judgment of the court): The plaintiff's ('the appellant') claim was for an order of specific performance of an option agreement dated 5 January 1977, allegedly given by Mr Chan Weng Sun — the late husband of the defendant ('the respondent' before us) — in respect of sale and purchase of a fruit plantation ('the orchard'), with an area of 19 acres, 1 rood and 3 poles under Grant No 23933 Lot 47 in the Mukim of Plentong, district of Johor Bahru. On the pleadings and the evidence, it was the appellant's case that the option to purchase the orchard at the price of RM80,000 had been exercised on 14 November 1977 but during his lifetime, the deceased Mr Chan — and now his widow Madam Yim Yut Kiu (the respondent) as the personal representative of his estate — had neglected and refused to honour the agreement. The respondent's contention was that the purported option was obtained by fraudulent means and was therefore null and void and unenforceable, and that during his lifetime the late Mr Chan was under no obligation to complete the said option agreement. Fraud and other defences in the alternatives were pleaded in the statement of defence including false representation, non est factum and failure of consideration.

It is important to note at the outset that the orchard in the 1977 option agreement was also the subject matter of an earlier business arrangement between the two parties as represented by a lease agreement entered by them in 1971 for a period of 15 years. The 1977 option agreement was thus executed during the currency of the lease agreement to run over a period of nine years until the expiry of the lease in 1986. It must also be observed that the friendly relationship between the appellant and the late Mr Chan started way back in 1968 and it is fair to assume that their friendship would have continued until the deceased's last days had it not been for this unfortunate dispute.

After a lengthy and intermittent hearing which commenced on 10 April 1991 and concluded on 14 December 1992, the learned trial judge dismissed the appellant's claim. He found on the evidence that the defence had succeeded in establishing fraud and at p 15 of his judgment dated 28 November 1993 the learned judge held:

> I make a finding that the defence had succeeded to that degree required in raising the defence of fraud that if the deceased knew it was an option to the plaintiff to sell the land at that price of RM80,000 and binding the land for nine years, he would not have signed it.
>
> I come to this conclusion as I believe and accept the defence's contention that the land was ancestral land to be given to the son. The family was not in need of any money to have to sell the land and there was no reason to do so. The deceased was comfortable in life, if not wealthy, and as a family, it was a picture of peace and harmony of a good Christian family. There was no reason why the father would not have handed the land to the son as he had been a dutiful son and had kept up the family name by being a good student. He was proud of him. The conditions were all there for him to have done that.

The subsequent conduct of a person often tells us of his antecedent act eloquently or the mind behind the act and can indicate what has transpired. A

I am very clear that when the father discovered that he had signed an option in error after knowing all the consequences of the same, he was in a fury and, on seeing the plaintiff for the first time thereafter, he lost no time in scolding him in no uncertain terms for having cheated him though he had been a good friend. His reaction was the normal reaction of a man who had been 'done'. B

As for his wanting to know the price of the land, it was the natural or everyday urge of one who would like to know the value of the property that he had in his possession. I do not consider anything unusual about that, to satisfy a curiosity.

To the plaintiff, he had the opportunity to perpetrate what he did and one could see the harm to him if the said land was in fact sold to someone else. It was already leased to him, in his hand so to speak. C

Since it is my decision that the defence had made out fraud to the degree required, my decision is that I dismiss the plaintiff's claim with costs to be taxed. D

The main issue for determination in this appeal is whether, on the various findings of fact made by the learned trial judge against the appellant, it would be sufficient to prove that the option agreement was obtained by fraud so as to render it unenforceable. The question is, did the appellant fraudulently mislead the late Mr Chan? And if so, was there a possible motive for such misconduct against a business friend? On the issue of fraud, it is the duty of this court to examine the evidence independently and come to our own findings either in agreement or otherwise with the findings of the trial judge (see *Arabinda Barma v Chandra Kanta* AIR 1954 Assam 94). E F

At the trial, the deceased's son, Chan Seng Onn (DW2) — who is a qualified lawyer — and Madam Yim Yut Kiu (DW1) played a paramount role in establishing the fact that the deceased could not possibly have entertained any idea of selling the orchard to anyone, as it was a well-known fact in the family that the land was ancestral property to be passed to the children. A deed of gift dated 9 March 1978 was produced to show consistency in the respondent's averment that the ancestral land could never be for sale. Further, at the material time neither the late Mr Chan nor his family was hard pressed for money, and there was also hardly any reason at all for the parties to enter into a separate option agreement in 1977 when the existing lease agreement over the same property was still in force and would continue till 1986. The following evidence of DW1 is relevant: G H

If in 1977 my husband and I had wanted to sell this land, we would have consulted my son, a lawyer and a valuation officer. In 1977, I did not know the value of the land. My husband was not aware of the value of that land. We had never visited the land between 1971 to 1977. We visited the land in November 1977 after the option was signed. I

We visited the land in 1977 because of this incident — we wanted to see a lawyer. He was not in and so we visited the land. My husband was not aware of the value of the land in Johor Bahru. I do not know what an 'option' is.

Further down in her evidence, she testified:

> My husband kept the document he signed in the drawer, thinking that it was not an important document as it had no stamp and the paper was also of poor quality. In July 1977, my son was attached to the army in Singapore. He visited me every Saturday and went back to his camp on Sunday. This document was not shown to my son. I had forgotten about that document.
>
> AFBD-6 – AFBD-12 — These documents were not shown to my son.
>
> At the end of October 1977, my son who was searching for something in the drawer discovered that document. My son told my late husband the document was selling that piece of land to Ang and my husband would be tied down about nine years and the purchase price of RM80,000. My son enquired if Ang paid him RM1. He replied in the negative. My late husband was very angry and said that Ang had cheated him. My son advised us to see a lawyer.

Mr Das for the appellant was at pains to point out that the sale of the property to the appellant under the option agreement was nothing new or strange because in cl 11 of the 1971 lease agreement — as well as cl 9 of the registered lease — the appellant had the right to purchase. But what is seriously bothering us is that, if the appellant could purchase the property under the terms of the lease, then what was the need for the 1977 option agreement? This important right of first option to purchase the property given to the appellant under cl 11 of the lease agreement provides:

> In the event of the lessor desiring to sell the said land during the term of this lease, the lessor must sell the said land only to the lessee *at a price to be fixed by a qualified valuer to be appointed by both the parties*. If the lessee does not agree to purchase the said land at a price valued by a qualified valuer, then the lessor shall not have any right to sell the said land to anyone during the period of this agreement.

Subject only to the express method of determining the sale price, cl 11 already granted the appellant the first option to purchase should the late Mr Chan decide to sell. In fact, this special clause also contained a restrictive covenant which totally prohibited the sale of the property to anyone else during the currency of the lease, even if the appellant had declined to purchase the property. The purpose of executing the 1977 option agreement whilst cl 11 was still in operation under the lease is therefore in question.

It is important to observe that the selling price of RM80,000 in the 1977 option is in conflict with the express intention of the parties under cl 11 of the lease that the price should be valued by a qualified valuer to be mutually appointed by both parties. The arbitrary price of RM80,000 in the disputed option document would appear to be the appellant's own concoction to which the late Mr Chan ought not and could not on the balance of probabilities have agreed without the benefit of a professional valuation at the material time. The two valuation reports were prepared in 1984 and 1992 long after the event, and as such they were not reliable and relevant for the purpose of satisfying cl 11.

In the circumstances of this case, it could not be true as alleged in the testimony of the appellant (PW2) that for some unknown reason it was the late Mr Chan himself who had told him that he wished to sell the property

at the price of RM80,000. If the deceased had any intention to sell the orchard, both the parties would have known that under the lease the deceased could not sell it to anyone except the appellant, and that the price should be fixed by a valuer to be jointly appointed by them. In our view, the learned trial judge was entitled to accept the defence's explanation that in fact it was the appellant who wanted the document to be executed and that the late Mr Chan had been fraudulently induced by misrepresentation as to the purpose of the option agreement. He was led to believe by the appellant that the document would not in any way affect his legal rights under the lease but was merely to enable the appellant to invite offers from the public for the purpose of testing the current value of the orchard for their personal enlightenment. For reasons which we shall give later, we find normalcy — as did the trial judge — in the natural desire of the deceased to know roughly the value of his orchard at that juncture of the lease period — a natural desire which the appellant had exploited to perpetrate his fraud.

The importance of the deceased's immediate reaction to the appellant's solicitor's letter dated 15 November 1977 about the exercise of the disputed option could not be underestimated. His reply dated 22 November 1977 to M/s AL Looi was as follows:

> I thank you for your letter dated 15 November 1977 on the above matter.
>
> The option referred to in the second paragraph of your said letter to sell my said land is denied by me.
>
> Sometime in November 1977, your client came to me and saw me at my residence. I told him that the above purported option was made without explaining to me. I refuse to accept the paper and I refuse to sell to your client as the contents of the said paper are void and invalid.
>
> In the circumstances, I deny that the said paper is an option to sell my land. I refuse to sell my land therefore.

Before us, the main criticism mounted against the decision of the learned judge centred on the alleged ambiguity in his written judgment as to whether his Lordship intended to make a finding on fraud or non est factum. Whatever imperfection there might be in the judgment, reading it as a whole — particularly the part quoted earlier — it is sufficiently clear to us that the learned judge was dealing with the defence of fraud and did find that the respondent had discharged the burden of proof on that plea based on the particulars of fraud pleaded in para 4 of the statement of defence, viz:

> The plaintiff orally represented to the defendant at No 32, Borthwick Drive, Singapore 19 sometime in July 1977, immediately before the signing of the said option agreement, that the said document was merely an authority given to the appellant to enable him to invite offers from the public as to the price of the said property and that signing the said document would in no way affect the defendant's legal rights, whereas in fact the said document was an option to sell the said property to the appellant for the sum stated therein. The appellant made the said representation fraudulently, either well knowing that it was false or recklessly not caring whether it was true or false. By means of the said false and/or fraudulent representation, the appellant induced the defendant to sign the said agreement.

A The crucial issue of fact to be determined was, did the appellant fraudulently induce the respondent to sign the option document by falsely representing to him that the option was merely intended as an authority to enable the appellant to test the property market by putting up the orchard for sale? On balance in the evidence, the learned judge answered it in the affirmative, and commented that he did not consider anything unusual in the respondent as a landowner 'wanting to know the price of the land', as it was a natural or everyday urge of any landowner to know the value of his property. Learned counsel for the appellant disagreed with the conclusion and questioned the necessity of signing a document if all that the respondent wanted to know was the value of the land. In our view, the reasonableness and correctness of the learned judge's conclusion can be tested against the undisputed factual situation of the case.

Firstly, the close business friendship between the late Mr Chan and the appellant started in 1968 when the appellant first became interested in developing the land in dispute into a fruit plantation. Secondly, on 4 July 1971 the 19-acre property was leased to the appellant for 15 years at what appeared to be a nominal rent of RM350 per year, which works out at about RM18 per acre per annum or RM1.50 per month. However, it must have been obvious to the late Mr Chan at that point of time that the nominal rentals made good business sense because in return, the appellant on his part was to invest a considerable sum of money (about RM100,000) to turn the barren property into a profitable orchard by levelling the land, clearing the jungle, building access roads, and quarters for the workers. Pursuant to the lease agreement, the appellant planted durian, lemon, lime, mango, banana and rambutan trees on a commercial basis. According to the appellant's evidence, initially there was as expected no income at all from the land, but in later years — particularly from 1984 — the appellant was able to earn about RM30,000–RM40,000 per annum. Taking an average income of RM35,000 per year, by the time the lease ended in 1986, it would be reasonable to assume that in all possibilities, the appellant could only manage to get back his capital expenditure with, if at all, a very narrow margin of profits. For such a low return, there must have been miscalculation somewhere in the joint venture development of the land on the part of the appellant. On the other hand, it must be remembered that Mr Chan practically got no income at all from his land for 15 years but in return, out of jungle land, he would reap the benefit of being the owner of a valuable orchard. In these circumstances, we do not think it was wrong for the trial judge to find normality in the late Mr Chan's curiosity in 1977, ie about six years after the project had started, to know the current value of his up-and-coming orchard. As such, it was easy for the appellant to exploit the situation fully by fraudulently misrepresenting that the so-called option document was not for the purpose of sale to him but merely to enable him to test the property market. By such sharp practice, the appellant would have the advantage of buying the orchard without proper valuation which would not otherwise be possible if the sale and purchase had been transacted under the existing cl 11 of the lease agreement.

Hence the motive and opportunity for the appellant to commit fraud on the late Mr Chan by means of the option document were all too clear

and self-evident. It is true that the appellant could have invoked his current rights under cl 11 of the lease to purchase the property but Mr Chan might not have wanted to sell, and even if he could have been persuaded to do so, the requirement of a jointly-appointed valuer would have defeated the object of the fraudulent plan. Until the expiry of the lease in 1986, the late Mr Chan was contractually prohibited from selling the property to anyone except the appellant. So, there was no conceivable reason why in 1977 the deceased should suddenly entertain the idea of selling the property by means of a fresh option to purchase to the appellant at a ridiculously low price of RM80,000 (about RM5,000 per acre) when there was already in existence a mechanism in the lease agreement for such eventuality, subject only to the price being fixed by a professional valuer. Having regard to the whole evidence in the court below, we agree with the learned judge that the respondent had successfully established fraud and that the appellant's claim for specific performance of the 1977 option agreement be dismissed. We could not see any purpose of the option agreement other than as a ploy to deprive the late Mr Chan of the true market value of the orchard.

Notwithstanding the irrelevancy of the two valuation reports (exhs PBD-1 and D19) for the purpose of cl 11, the vast difference in valuation is amazing. As at 5 January 1977, the valuation report prepared by Param & Associates for the appellant/plaintiff put the valuation at around RM6,000 per acre on the basis that the property could not be sold except to the lessee until expiry of the lease on 3 July 1986. Taking into account this contractual constraint, the fair market value of the property was fixed at RM74,300. On the other hand, the respondent's valuation report put the market value at RM190,000 as at 5 January 1977, and at RM840,000 as at the expiry of the lease on 3 July 1986. Such vast discrepancy in valuation would certainly justify the requirement of a joint valuation under cl 11, the breach of which should not assist the appellant in obtaining the equitable remedy of specific performance.

There was no evidence that the deceased was in any financial difficulty in 1977. As such, if his valuation report (exh D19) were to be believed, there was no conceivable reason why he should wish to sell the 19-acre orchard to the appellant for a mere RM80,000 when he could have waited until the expiry of the lease before selling the ancestral property at a price of RM840,000.

In our view, the three letters written in 1977 by the late Mr Chan are consistent with the defence's version that the deceased at no time had any intention to sell the ancestral land to anyone (see letters dated 5 November 1977, 22 November 1977 and 10 December 1977) at pp 471, 547 and 638. We agree with the learned judge that the option agreement was brought into existence by the appellant's fraud as alleged by the defence. In the circumstances of the present case, the fact that prior to the issue of writ, neither the deceased nor members of his family had used in any of their letters the word 'cheating' or 'fraud' is not by itself fatal. What the court has to decide is whether in the totality of the oral and documentary evidence, there was fraud as defined in s 17 of the Contracts Act 1950. In this case there was opportunity to commit the fraud and there was motive;

there was no reason for the sale of the ancestral property and finally, there was no reason to sell the property by option to purchase when there was already cl 11 in the lease agreement for such sale to the appellant prior to the expiry of the lease without the necessity of a fresh option agreement. In our view, there is ample evidence of fraud to transfer the property by means of the option agreement. For reasons already advanced, we are satisfied that the appellant's assertion that the intention to sell the property to him originated from the deceased was entirely against the weight of the evidence. In the context of the business arrangement between them, as represented by the lease agreement, there can be no doubt that fraud had been established by the appellant's act in deceiving and inducing the deceased to sign the option agreement within the meaning of s 17. This was certainly not a case of the deceased's family trying to rescue him from a poor bargain. On the contrary, it is a case of the appellant trying to rescue himself from a narrow margin of profit under the lease agreement after investing RM100,000. It is a common principle of valuation that an unencumbered piece of property would fetch a better price than one that is encumbered. This is clearly reflected by the conflicting opinion in the two valuation reports which show a vast difference between the encumbered value of the orchard in 1977 and the unencumbered value at the expiry of the lease in 1986. Such difficulty in fixing the reasonable price would have been avoided if the appellant had stuck to his bargain in the lease agreement, whereby a valuer must be appointed by both parties for the purpose of any sale to the appellant. Apart from the irrelevancy of the appellant's valuation report to support the price of RM80,000 under the cl 11 sale, the valuer had also rendered it unreliable by admitting in the witness box that the report did not comply with the principle of valuation in determining whether or not the orchard should be valued as an encumbered property, by reason of the lease agreement. On the facts of this case, it was clearly wrong for the appellant's valuer to value the orchard as an encumbered property during the period of the registered lease when the intended purchaser is also the lessee.

As conceded by the appellant's valuer in the court below, if the purchaser was the lessee himself, the lease could not form an encumbrance for the purpose of valuation. The valuation report produced by the appellant was prepared by Mr K Parampathy of Messrs Param & Associates. Under cross-examination, Mr Parampathy made a startling revelation that he was not told about the purchaser being the lessee. Now, why did the appellant keep such an important fact from his own valuer? What was he afraid of? Was he trying to prevent the valuer from knowing that the correct valuation should be done under cl 11 of the lease? In any event, the unreliability of the RM80,000 valuation could not be cured simply by the off-the-cuff correction in the witness box by Mr Parampathy that, 'If the purchaser is the lessee Mr Ang, the value is RM115,608'. The admission on the incorrect basis of valuation can only mean that the appellant's valuation report fixing the sale price of RM80,000 is totally wrong and must be rejected. The respondent's valuation report gave almost double the appellant's valuation, viz RM190,000 in 1977 and RM840,000 in 1986. Since the sale price of RM80,000 is unreliable, grossly inadequate and fixed in breach of cl 11 of the lease agreement, specific performance ought

not to be granted in any event (see *O'Neil v Arnew* (1976) 78 DLR (3d) 671). Further, in *Pateman v Pay* (1974) 232 EG 457 it was held that where an option agreement drafted by the purchaser was not understood by the vendor despite absence of deliberate fraud, the purchaser's claim for specific performance or damages would be dismissed where there was element of sharp practice. The basis of the remedy of specific performance lies in equity and as such where — as in the present case — the appellant did not come with clean hands, the court was entitled in any event to refuse the remedy in order to protect the vendor from being a victim of sharp practice.

Looking at this case from another angle, the whole development of the orchard was in the nature of a joint-venture for a period of 15 years, with the late Mr Chan providing for the land and the appellant providing the expertise and financial needs of the project. In the circumstances, it is fair to say that although they were not partners under the Partnership Act 1961, there was a fiduciary relationship between them which generated an obligation on the part of the appellant to remind the late Mr Chan — even assuming for one moment for the sake of argument that Mr Chan did have the intention of selling the property to him — that cl 11 of the existing lease agreement between them required the purchase price to be fixed by a valuer to be appointed by them jointly. In our opinion, it was a breach of good faith and fiduciary duty for the appellant to purchase the property at RM80,000 without first obtaining the opinion of professional valuer as stipulated in cl 11.

In view of our conclusion on the issue of fraud, there is no necessity for us to deal with the defence of non est factum, and as such, the question of 'want of care' need not be gone into. Nor is it necessary for us to go through the respondent's alternative argument that the appellant had failed to exercise the option in accordance with its express terms, or the other argument that the appellant should not be granted damages in lieu of specific performance as this claim was not pleaded on the basis of alternative remedy.

The remaining issue for our determination is one of law on the nature of the burden of proof on fraud in civil proceedings. In this case, the learned trial judge found fraud on the basis of burden of proof as laid down by the Federal Court in *Lau Kee Ko & Anor v Paw Ngi Siu* [1974] 1 MLJ 21, where Raja Azlan Shah J (as he then was) speaking for the Federal Court held (at p 23):

> It is a wholesome rule of our law that where a plaintiff alleges fraud, he must do more than establish the allegation on the basis of probabilities. While the degree of certainty applicable to a criminal case is not required, there must, in order to succeed, be a very high degree of probability in the allegation.

In that case, the Federal Court considered the question of civil fraud, viz error regarding the person with whom a party was contracting in a non-disclosure situation. The following passage in the judgment of Raja Azlan Shah J at the same page is worth noting:

> In my opinion what is important in a case like the present is whether consideration of the person with whom the respondent was contracting

formed a material element of the contract. If the answer is 'yes' then, non-disclosure of the undisclosed principal annuls the contract. That may amount to fraud. The law is laid down by Fry J (as he then was) in *Smith v Wheatcroft* (1878) 9 Ch 223 at p 230 where he quotes and approves *Pothier, Traite des Obligations* where he says:

> 'Does error in regard to the person with whom I contract destroy the consent and annul the agreement? I think that this question ought to be decided by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent, and consequently annuls the contract ... . On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand.'

That passage has been applied to cases analogous to the present, viz by North J in *Nash v Dix* (1898) 78 LT 445 at pp 448–449; by Smith LJ in *Gordon v Street* [1899] 2 QB 641 at p 647 and by McCardie J in *Said v Butt* [1920] 3 KB 497 at p 501.

Counsel for the appellant has referred to us authorities which with few exceptions seem to establish the proposition that the criminal burden is applicable to every allegation of fraud, but it must be noted that the majority of the leading authorities on the subject were dealing with criminal fraud in civil proceedings. The first authority is Lord Atkin's judgment in *ALN Narayanan Chettyar & Anor v Official Assignee High Court Rangoon* AIR 1941 PC 93, where the Privy Council held that fraud, like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt. A finding as to fraud cannot be based on suspicion and conjecture. In that case, the evidence was voluminous and consisted in large part on entries in account books. The fraud alleged by the plaintiff was that the sale of certain property was fictitious as a result of an alleged conspiracy between one Mr Kasi and Mr Subbaya to defraud the plaintiff's firm. There was difficulty in the evidence to ascertain the nature of the conspiracy. It was mainly for this reason that the Privy Council agreed with the appellate court that the finding of fraud by the subordinate court was based on mere suspicion arising from entries made in the account books.

The second authority is another Privy Council case, *Hansraj Gupta & Ors v Dehra Dun Mussoorie Electric Tramway Co Ltd* AIR 1940 PC 98, where it was held the party alleging fraud is bound to establish it by cogent evidence and suspicion cannot be accepted as proof. Unless therefore the proved circumstances are incompatible with the hypothesis of the person charged with fraud having acted in good faith, they cannot be accepted as affording sufficient proof of fraud. The facts of the case again involved complicated evidence arising from the claim of a company, through its liquidators, of a sum of money against the defendants on the ground of fraudulent conspiracy of one Mr Raghumal and his agent Mr Lala Mela Ram in the misappropriation of the sum claimed. Since there was evidence that they were working in good faith, the evidence was insufficient to prove fraud.

The third authority is by our (then) Supreme Court in the case of *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371, which was also a case involving a criminal conspiracy to defraud under the National Land Code 1965. It was held that the criminal standard was required to prove fraud; and suspicion, however grave, is not proof for the purpose of defeating the indefeasibility of title under s 340(2) of the National Land Code 1965.

Other cases cited included the Privy Council case of *Saminathan v Pappa* [1981] 1 MLJ 121 where at pp 123–124 Suffian LP in the Federal Court cited *Narayanan Chettyar* for the proposition that the defendant must prove fraud not on a balance of probabilities but beyond reasonable doubt for the purpose of proving the plaintiff's name as registered owner under s 340 of the National Land Code 1965. On the evidence, the Federal Court found no evidence of fraud at all because, in the first place, it was the Ruler in Council who had rejected the defendant's application to have the land transferred to him and subsequently, on the plaintiff's application, the Ruler in Council consented to transfer the land to her. At p 124, Suffian LP said:

> As regards the plaintiff's alleged fraud in misrepresenting to the Ruler in Council that the defendant was in India when he was in fact in Malaysia and that Palaniandy and the defendant were no longer interested in the land, as already stated, the burden is on the defendant to prove the plaintiff's alleged fraud beyond reasonable doubt. Has he done so? The only evidence of fraud came from the Collector who appeared in the witness box and who also handed over to the court the relevant file from his office. But with due respect I do not think that that was enough. There was no evidence that he was a member of the Executive Council that advised the Ruler on the defendant's and plaintiff's applications. It is true that the paper submitted to Executive Council on the plaintiff's application (p 159 of the appeal record) mentioned only the two PAs and did not mention the sale agreement P2, but there was no evidence from any member or the Secretary of the Council or in what way the contents of the paper or omissions from it influenced their decision one way or another, it being quite well-known that even if all documents were in order the Ruler in Council could still refuse his consent to an application of this kind, decisions on which being made on grounds of public policy, not on considerations of law. I would therefore respectfully disagree with the learned judge that the defendant has satisfied the court beyond reasonable doubt that the plaintiff has been guilty of fraud.

The criminal standard, ie proof beyond reasonable doubt, was also applied by the Privy Council in *Datuk Jagindar Singh & Ors v Tara Rajaratnam* [1986] 1 MLJ 105. There the fraud was based on criminal breach of trust and undue influence in the transfer by the plaintiff's land. At p 110, Lord Keith of Kinkel held:

> Nevertheless he, and also the Federal Court, correctly directed themselves that the standard of proof of fraud in civil proceedings was the criminal standard of proof beyond reasonable doubt.

Again, in *Chu Choon Moi v Ngan Sew Tin* [1986] 1 MLJ 34, the Supreme Court held at p 38:

A We agree that fraud whether made in civil or criminal proceedings must be proved beyond reasonable doubt and cannot be based on suspicion and conjecture (*Narayanan v Official Assignee Rangoon* AIR 1941 PC 93; *Saminathan v Pappa* [1981] 1 MLJ 121). Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The degree of proof need not reach certainty but it must carry a high degree of probability. What it B means is that the evidence adduced is such that the court believes its existence or a prudent man considers its existence probable in the circumstances of the particular case. If such proof extends only to a possibility but not in the least a probability, then it falls short of proving beyond reasonable doubt (see 'proved' at s 3 of the Evidence Act 1950 and *Liew Kaling & Ors v PP* [1960] MLJ 306). In the present appeal before us, the C facts and circumstances of the case in relation to the part played by the respondent point to the probability that any prudent man would under the circumstances accept it to be fraudulent.

Again, in *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35 at p 38, the Supreme Court reaffirmed D — following *Saminathan v Pappa* — that onus of proof of fraud in this country is proof beyond reasonable doubt.

However, for forgery in bank charges, the Supreme Court in applying the civil burden of proof held in *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182 at p 188, following *Sykt Islamiyah v Bank Bumiputra Malaysia Bhd* [1988] 3 MLJ 218:

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> Another important matter has been raised by the appellant in connection with the issue of forgery. It was argued for the appellant both in the court below and before us that the standard of proof required in cases such as this should be beyond a reasonable doubt and *Sykt Perkapalan Timor v United Malayan Banking Corp Bhd* [1982] 2 MLJ 193 was cited in support. We F have examined this decision with some care but we are unable to agree with the appellant's counsel that it is authority for the proposition that is put forward for the appellant. In our judgment, a customer who alleges that his banker honoured forged cheques drawn on his account need only establish the charge of forgery on a balance of probabilities and in this respect, we agree with the statement of the law by Gunn Chit Tuan J (as he then was) G in *Sykt Islamiyah v Bank Bumiputra (Malaysia) Bhd* where at p 220 the learned judge said:
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> > 'In this case although it would appear that there was no or insufficient evidence to prove beyond reasonable doubt for purposes of criminal proceedings that the signatures on the cheques concerned were forged by the said Awang @ Che Mah bin Che Lob, yet I was satisfied that H there was evidence adduced to prove on a balance of probabilities in this case that the signatures on the cheques were not those of the plaintiff's but were forged or placed thereon without the plaintiff's authority and were therefore wholly inoperative.'
>
> We are therefore of the opinion that the learned judge did not misdirect I himself on the measure of proof that is required to bring home a case of forgery on the facts of such a case as the one before us.

From the wide definition of 'fraud' under s 17 of the Contracts Act 1950 as well as leading authorities on the subject, where the allegation of fraud

in civil proceedings concerns criminal fraud such as conspiracy to defraud or misappropriation of money or criminal breach of trust, it is settled law that the burden of proof is the criminal standard of proof beyond reasonable doubt, and not on the balance of probabilities. It is now well established that an allegation of criminal fraud in civil or criminal proceedings cannot merely be based on suspicion or speculation. In allowing the appeal in *Lau Kee Ko & Anor v Paw Ngi Siu*, the Federal Court reversed the judgment of the High Court on the finding of a civil fraud in a non-disclosure dispute wherein the plaintiff was led to think that he was contracting with the owner when in point of fact he was contracting with an agent. The fraud alleged was purely civil in nature and based on whether there was any personal consideration when the plaintiff entered into the contract, and on that basis the burden of proof was the civil burden. We agree with both counsel that to the extent that the general statement of the law in *Lau Kee Ko* is understood to mean a total rejection of the criminal burden in all cases of fraud, it is no longer good law. But where the allegation of fraud (as in the present case) is entirely founded on a civil fraud — and not based on a criminal conduct or offence — the civil burden is applicable.

From all the authorities cited before this court, it seems clear that fraud can be civil or criminal in any civil proceedings. Hence *Osborne's Concise Law Dictionary* (8th Ed) at p 152 defines fraud as follows:

> The obtaining of a material advantage by unfair or wrongful means; it involves obliquity. It involves the making of a false representation knowingly, or without belief in its truth, or recklessly. If the fraud causes injury, the deceived party may claim damages for the tort of deceit. A contract obtained by fraud is voidable at the option of the injured party. Conspiracy to defraud remains a common law offence, the *mens rea* of which has been defined as 'to cause the victim economic loss by depriving him of some property or right corporeal or incorporeal, to which he is or would or might become entitled', per Lord Diplock in *R v Scott* [1975] AC 814. Certain other frauds are likewise criminal offences, eg under the Prevention of Fraud (Investments) Act 1958.

Indeed, our s 17 of the Contracts Act 1950 recognizes the various shades of fraud by defining it as follows:

> 'Fraud' includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:
>
> (a) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;
>
> (b) the active concealment of a fact by one having knowledge of belief of the fact;
>
> (c) a promise made without any intention of performing it;
>
> (d) any other act fitted to deceive; and
>
> (e) any such act or omission as the law specially declares to be fraudulent.
>
> *Explanation* — Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the

A case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

The definition of 'fraud', read in conjunction with the authorities, leads us to the conclusion that where the fraud alleged in civil proceedings is based B on a criminal offence, the criminal burden of proof beyond reasonable doubt must be applied. But where the fraud alleged is purely civil in nature, there is no reason why the civil burden should not apply.

The particulars of fraud pleaded by the respondent in this appeal fall under s 17 read with 'misrepresentation' under s 18. 'Misrepresentation' C is defined to include:

(a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(b) any breach of duty which, without an intent to deceive, gives an advantage to the person committing it, or anyone claiming under him D by misleading another to his prejudice, or to the prejudice of anyone claiming under him; and

(c) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

In this case, the sharp practice perpetrated by the appellant on the deceased E did not amount to a criminal offence. Although the late Mr Chan might have known that he was signing an option agreement, we are satisfied that both parties knew all along that the document was merely intended to be used not for actual sale to the appellant but for the purpose of enabling him to test the property market. This explains why the sale price of F RM80,000 was never fixed in accordance with cl 11 of the lease agreement. The fraudulent act complained of was not only in the procurement of the option agreement, but also in using the document for a purpose in breach of cl 11. Since the allegation of fraud was purely civil in nature and not based on or connected with a criminal offence, the learned judge did not err in law in applying the civil burden of proof. In any event, for reasons G already advanced, the remedy of specific performance ought not to be granted in the circumstances of this case and as such the decision of the learned judge in refusing to grant the remedy must be upheld.

We would dismiss this appeal with costs and the deposit should be paid to the respondent to account of taxed costs.

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Appeal dismissed.

Reported by Kenneth Goh

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